90-331

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CORINTH PIPEWORKS S.A.,
Petitioner

v.

GULF CONSOLIDATED SERVICES, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Respondent is the out-of-state subrogee of a Texas pipe merchant who made a foreign purchase, who now sues the alien manufacturer on that purchase contract. Does the exercise of long-arm jurisdiction deprive the alien manufacturer of due process in conflict with this Court's decision in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987)?

LIST OF PARTIES

Corinth Pipeworks S.A.
Gulf Consolidated Services, Inc.
American Motorists Insurance Company

RELATED CORPORATIONS

Petitioner has no parent companies, no subsidiaries, and no affiliates.

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A writ of certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (1a, *infra*) is reported at 898 F.2d 1071. The opinion of the magistrate, to whom the question was referred in the district court, (29a, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals (46a, *infra*) is dated April 26, 1990, and it was entered on that date. A petition for rehearing was denied on May 23, 1990. (48a, *infra*) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "* * * nor shall any State deprive any person of * * * property, without due process of law; * * *."

STATEMENT OF THE CASE

Gulf Consolidated Services, Inc., nominal respondent, is a Texas corporation with its principal office in Houston, Texas. (R. 333; Tr. 38; R. 67-68 (37a-38a, *infra*)) It is engaged in the business of importing and selling pipe. (Tr. 38; R. 68 (38a, *infra*))

Corinth Pipeworks S.A., petitioner, is a Greek corporation with its principal office in Athens, Greece. (Mitropoulos Dep. 4, Def. Ex. 32; R. 68 (38a, *infra*)) Corinth Pipeworks operates a factory at Corinth, Greece, where it is engaged in the business of manufacturing and selling pipe. (Mitropoulos Dep. 4; Tr. 2-124-26; Def. Ex. 32; R. 68 (38a, *infra*))

In March, 1980, Gulf Consolidated approached Corinth Pipeworks regarding the purchase of oil well casing. (Mitropoulos Dep. 4-5; Def. Ex. 1) After an exchange of telexes, Gulf Consolidated purchased 2,500 tons of casing pipe. (Mitropoulos Dep. 4-7; Def. Ex. 1-7) The

final act creating the contract was confirmation of the letter of credit opened by Gulf Consolidated at the National Bank of Greece. (Mitropoulos Dep. 8) Corinth Pipeworks was required to manufacture the pipes and to deliver them aboard a vessel in the Port of Corinth and to obtain a bill of lading from the ship, whereupon ownership and control passed to Gulf Consolidated. Uniform Com. Code § 2-320; G. Gilmore & C. L. Black, *The Law of Admiralty* §§ 3-6 - 3-18 (2d ed. 1975). Upon presentation of the shipping documents to its bank in Greece, Corinth Pipeworks was there paid the purchase price. (Mitropoulos Dep. 8) Corinth Pipeworks made several subsequent sales to Gulf Consolidated according to the same procedure and conditions. (Mitropoulos Dep. 8)

One such sale was made in October, 1980. (Pl. Ex. 1; Def. Ex. 16; Mitropoulos Dep. 9-12; Tr. 38-39) Again, to complete the making of the contract, Gulf Consolidated opened a letter of credit at the National Bank in Greece. (Mitropoulos Dep. 11; Def. Ex. 17-18; R. 68 (38a, *infra*)) The pipe to fill this order was manufactured by Corinth Pipeworks and delivered to a ship in the Port of Corinth for transportation to Houston. (Tr. 2-133-154; Def. Ex. 19-26; R. 68 (38a, *infra*)) A clean bill of lading was issued to Corinth Pipeworks by the master of the vessel. (Pl. Ex. 3; R. 68 (38a, *infra*)) Having completed its obligations under the contract, Corinth Pipeworks delivered the shipping documents to its bank in Athens and drew down the credit. (Mitropoulos Dep. 12; R. 68 (38a, *infra*))

The pipe was received in Houston by Gulf Consolidated. (Tr. 39-40; Pl. Ex. 4) Some of it was subsequently sold to W. W. Buchanan, who installed it in an oil well

in West Texas. (R. 68-69 (39a, *infra*)) After the casing was set, leaks developed which caused extensive losses to Buchanan. (R. 69-70 (39a, *infra*)) Buchanan was reimbursed by American Motorists Insurance Company, Gulf Consolidated liability insurer. (Tr. 46) American Motorists is an Illinois corporation with its principal place of business in Illinois. (R. 90, 337; Tr. 2-187; R. 68 (38a, *infra*))

American Motorists filed suit, in the name of Gulf Consolidated, in the District Court of Harris County, Texas. (R. 333) Invoking diversity jurisdiction, 28 U.S.C. § 1332(a)(2), Corinth Pipeworks removed the action to the federal district court (R. 328), 28 U.S.C. § 1441, and challenged the court's personal jurisdiction in a motion for summary judgment (R. 301).

The motion was referred to a magistrate (R. 290), who recommended that jurisdiction be sustained under the "stream of Commerce" theory, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980), because Corinth Pipeworks was aware that its product probably would be used in Texas. (29a-36a, *infra;* R. 231-38) That recommendation was accepted, and the motion was denied by the district court. (28a, *infra;* R. 183)

After a bench trial, the district court ruled that all causes of action except for breach of contractual warranties were barred by limitations (41a-42a, *infra;* R. 71), a ruling not challenged on appeal. Finding against Corinth Pipeworks on the contract issues (37a-43a, *infra;* R. 67-72), the court entered judgment that the plaintiff recover its damages. (44a, *infra;* R. 29-30)

Jurisdiction was sustained by the court of appeals. (1a, *infra;* 898 F.2d 1071) A majority of the panel agreed

that the "stream of commerce" doctrine supported jurisdiction and held that the case was not controlled by this Court's decision in *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102 (1987), which calls for particular restraint in the exercise of long-arm jurisdiction over alien defendants.

Judge Reavley, dissenting, (15a-27a, *infra;* 898 F.2d 1078-83) questioned the applicability of the "stream of commerce" doctrine to a contract dispute. He pointed out that Corinth Pipeworks had not "reached out" of Greece to create a relationship with Gulf Consolidated and had no continuing contract with Gulf Consolidated, *cf. Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985). He also said that under this Court's decisions in *Asahi Metal Industry* and *Burger King Corp.,* exercise of jurisdiction over Corinth Pipeworks in this case was not fair and reasonable and therefore did not constitute due process.

REASONS FOR GRANTING THE WRIT

This Court has established that "[t]he strictures of the Due Process Clause forbid a state court from exercising personal jurisdiction over [a non-resident] under circumstances that would offend 'traditional notions of fair play and substantial justice.'" *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 113 (1987); *Internat. Shoe Co. v. Washington,* 326 U.S. 310 (1945). The fairness and reasonableness of the exercise of long-arm jurisdiction in any case is held to depend on the court's evaluation of several factors: (1) the burden on the defendant, (2) the interests of the forum State, (3) the plaintiff's interest in obtaining relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest

of the several States in furthering fundamental substantive social policies. *Asahi Metal Industry* at 113; *World-Wide Volkswagen* at 292. Further, in a case involving a defendant from a foreign country instead of a neighboring State, it is established that the court should be unwilling to find the serious burdens on the defendant outweighed by minimal interests on the part of the plaintiff or the forum State. *Asahi Metal Industry* at 115.

Asahi Metal Industry involved a question of State Court jurisdiction over a Japanese tire valve manufacturer impleaded by its customer, a Taiwanese tire maker, in a products liability suit brought in California by the victim of a motorcycle accident. Though the man injured and the woman killed were California residents, and the accident occurred on a California highway, at the time of the ruling on jurisdiction the plaintiffs' claims had been settled, and the only parties before the Court were non-residents. This Court held that California's legitimate interests in the dispute thus had been "considerably diminished." *Id.* at 114.

The Court also noted the severity of the burden on the foreign defendent to come to the forum State to litigate, *Id.*, and then pointed out the necessity of particular circumspection in a case involving the imposition of jurisdiction not on a citizen of a sister State but on a resident of a foreign country:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the federal interests in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the par-

> ticular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state.

Id. at 113.

The Court concluded: "Considering the international context, the heavy burden on the alien defendant, and the slight interest of the plaintiff and the forum state, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair." *Id.* at 116.

In the instant case, the majority of the court of appeals at least recognized three of the factors it should have weighed: the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. (6a, *infra;* 898 F.2d 1074) The court acknowledged that the burden on Corinth Pipeworks was significant but considered "most important" the interest of the State of Texas in providing a forum for litigation. (7a, *infra;* 898 F.2d 1074) The court in effect disregarded the international context and ignored altogether the fact that the only plaintiff before the Court is a resident of Illinois, a fact which must "considerably diminish" the interest of the State of Texas in this litigation. In sustaining *in personam* jurisdiction over Corinth Pipeworks, the Court of Appeals for the Fifth Crcuit ruled in direct conflict with this Court's holding that in a case involving a defendant from a foreign country our courts should be "unwilling to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." *Asahi Metal Industry* at 115.

The errors of the majority were pointed out in Judge Reavley's dissenting opinion. (15a-27a, *infra;* 898 F.2d 1078-83) He noted that the distribution of Corinth's product in Texas by Corinth's customers, even though extensive, was not the result of any effort made by Corinth in Texas and thus constituted no "purposeful availment" (*Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) of Texas laws by Corinth. (16a-21a, *infra;* 898 F.2d 1078-80) He also noted that the contract in question provided for no "continuing relationship" (see *Burger King Corp.*, 471 U.S. at 473) between Corinth Pipeworks and Gulf Cosolidated. (18a, *infra;* 898 F.2d 1079). He weighed each of the factors which should have been considered by the majority in appraising the fairness of the imposition of jurisdiction on Corinth Pipeworks and found a clear departure from this Court's holding in *Asahi Metal Industry*. (24a-27a, *infra;* 898 F.2d 1082-83)

Whether or not the "stream of commerce" doctrine might have been fairly applicable if a Texas workman had been injured by Corinth's pipe and had brought a tort action in a Texas court, it is not fair or reasonable to utilize that or any other doctrine to require Corinth Pipeworks to come to Texas to litigate *contract* questions with Gulf Consolidated, the party who went to Greece and there purchased, paid for, and assumed ownership and control of the pipe. It is even less fair to require Corinth Pipeworks to come to Texas to litigate such questions with Gulf Consolidated's subrogated insurer from Illinois.

The decision of the court of appeals is clearly in conflict with the decision of this Court in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). It casts an uncertain shadow over every foreign purchase made by someone from this country and needlessly in-

hibits our foreign commerce. A writ of certiorari should be granted to eliminate this uncertainty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS

April 26, 1990

GULF CONSOLIDATED SERVICES, INC.,
Plaintiff-Appellee,

v.

CORINTH PIPEWORKS, S.A.,
Defendant-Appellant.

No. 89-2451.

United States Court of Appeals,
Fifth Circuit.

April 26, 1990.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, REAVLEY, and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

Today's case presents the question whether a Greek oil field casing manufacturer, licensed by a Texas-based organization which allows the manufacturer to warrant conformity with certain set standards, was properly haled into court in Texas to answer a claim that its products failed to conform to those standards. Because the manufacturer had an expectation that its products would be used in Texas, and having determined that its being required to defend suit in Texas was not unfair, we affirm the district court's exercise of personal jurisdiction.

I. *Facts*

The nominal plaintiff-appellee, Gulf Consolidated Services, Inc., ("Gulf") is a Texas corporation with its principal office in Houston, Texas. Its insurer, the real party in interest who prosecuted this action, is American Motorists Insurance Company ("AMI"), an Illinois corporation with its principal place of business in Illinois. The defendant-appellant, Corinth Pipeworks, S.A., is a Greek corporation with its principal offices in Athens, Greece.

In 1980, Gulf, under the name of International Materials & Services Co. ("IMS"), was engaged in the business of importing and selling pipe. In October of that year, IMS purchased 1,260 joints of steel oil field casing from Corinth. Corinth warranted that the casings were manufactured in accordance with American Petroleum Institute ("API") standards.

After the casings arrived in Houston, Texas, they were sent to a pipe threading company. Following threading, 66 joints of the casings were then sold by IMS to United Pipe & Supply ("United") in Midland, Texas. United subsequently sold the casings to one Wayman Buchanan. The 66 joints were sent to Mr. Buchanan's oil well, Neely No. 1, in Wheeler County, Texas.

During drilling operations on the well, the casing failed in seven separate locations, increasing the cost of the well by $433,587.81. Two unused joints of the 66 sent to the site were taken to Failure Analysis Associates in Houston, where Metallurgical tests and examinations indicated that the two casings contained weld seam defects. These defects demonstrated that the casings inspected were not manufactured in accordance with API specifications. United reimbursed Mr. Buchanan for the additional drill-

ing expenses incurred; and United was reimbursed, in turn, by AMI.

Following a bench trial, the district court found Corinth liable for breach of an express warranty that the casing would meet API specifications and for breach of the implied warranties of merchantability and fitness for a particular purpose. The court awarded actual damages of $433,587.88, prejudgment interest in the amount of $394,640.62, attorneys' fees in the amount of $55,050.18 and costs of $6,960.20.

II. *Discussion*

A. Jurisdiction

Corinth does not challenge its amenability to suit under the Texas Long-Arm Statute, but contends that it lacked sufficient contacts with Texas for it to be subject to the personal jurisdiction of the district court.

To satisfy the demands of due process, two requirements must be met before a non-resident defendant can be amenable to suit in a given forum. First, "(a) the nonresident must have some minimum contacts with the forum resulting from an affirmative act or acts on their part;" second, "(b) it must not be unfair or unreasonable to require the nonresidents to defend the suit in the forum state." *Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1148 (5th Cir. 1985).

1. Minimum Contacts

"[T]he concept of minimum contacts permits a nonresident to 'structure his primary conduct as to avoid being haled into court in a particular state.' " *Thompson*

v. Chrysler Motors Corp., 755 F.2d 1162, 1169 (5th Cir. 1985). Corinth alleges that it had pursposefully structured its conduct so as to avoid being haled into Texas. Corinth maintains that the following facts demonstrate its successful avoidance of minimum contacts with Texas in the present transaction: Corinth, a Greek corporation with its offices and factory in Greece, is not registered to do business in Texas or any other location in the United States; it maintains no agent, office, or assets in the United States; IMS and Corinth negotiated the transaction by telegram; the actual sale took place in Greece; IMS opened its letter of credit at a Greek bank in Athens; under the terms of the sale, performance was complete when it delivered the casings to the ocean carrier in Greece, the risk of loss transferring to the plaintiff at that time, Corinth also notes that all of its sales of pipe to United States customers had been on similar terms.

[1-3] Although a party can, through its actions, avoid being haled into a foreign jurisdiction, the simple fact that a sales transaction is consummated outside that jurisdiction does not prevent the sale from forming the basis of jurisdiction. *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197 n. 8 (1980) ("jurisdiction does not depend on the technicalities of when title passes"). Nor is jurisdiction always successfully evaded merely because the defendant has avoided physical contact with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985). The "minimum contacts" requirement is satisfied, and "specific" jurisdiction proper,[1] where the contact with the forum arises from the sale or

1. Although Gulf contends that both "specific" and "general" jurisdiction exist, our ruling that the requirements of the former are met obviates the need to address the latter.

manufacture of a product by a foreign defendant, which has caused harm in the forum state, so long as the defendant delivered the product into the "stream of commerce" with the expectation that it should be purchased by or used by consumers in the forum state. *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987) (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)).

Here, Corinth's expectation that the casings would be used in Texas is undisputable. Corinth had a license agreement with API, an organization in Dallas, Texas, which allowed Corinth to sell API specification pipe. IMS purchased the casing in question in reliance upon Corinth's warranty that the casing was manufactured in accordance with API specifications. Corinth's sole market for API oilfield casing was Houston, Texas, and Corinth representatives frequently called on customers there. Corinth was the charterer of the vessels which carried the casing shipments from Greece to Houston.

[4] Corinth contends that the "stream of commerce doctrine" is inapplicable in this case as the nominal plaintiff in the suit did not encounter the product in the stream of commerce. This contention is meritless. The question to be answered in determining whether "minimum contacts" has been satisfied is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 295, 100 S.Ct. at 566. A defendant's expectation that it may be held into a foreign court does not lessen simply because the ultimate consumer's claim of damages is subrogated to an insurer.

2. Fair and Reasonable

[5] The second part of due process analysis asks the question whether it is fair and reasonable to request the non-resident defendant to defend suit in the forum. The determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors, including the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102, 113, 107 S.Ct. 1026, 1033-34, 94 L.Ed.2d 92 (1987).

In *Asahi,* the Court was faced with a situation in which a Taiwanese motorcycle inner tube manufacturer sought indemnity in a California court from its Japanese supplier of valve stems for its settlement of a personal injury claim. In analyzing the burden on the defendant in defending the suit in California, the court stated:

> Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

Id. at 114, 107 S.Ct. at 1034. Likewise, the burden on Corinth, in having to defend suit in a legal system greatly different from that of Greece, should be given significant

weight in our assessment of the reasonableness of Texas's assertion of personal jurisdiction in the present case.

[6] The burden on a defendant to have to defend suit in a foreign country may nonetheless be justified if the interests of the plaintiff and the forum are of sufficient importance. *Id.* In *Asahi,* the interests of the plaintiff and the forum were held to be slight for several reasons: the transaction took place in Taiwan; *Asahi's* valve stems were shipped from Japan to Taiwan; the Taiwanese company had not demonstrated that it was more convenient for it to litigate its indemnification claim in California, rather than in Taiwan or Japan. Moreover, because the plaintiff was not a California resident, California's legitimate interests in the dispute were found to have been considerably diminished.

[7] Although the transaction in the present case took place in Greece, the defendant sold the pipe in anticipation that it would be shipped to Texas aboard a ship it chartered. Most important, however, Texas has a demonstrable interest in providing a forum for litigation involving an allegedly defective product where the product was intended for use in Texas, where the defect surfaced in Texas, and where the economic injury befell a Texas resident. *See Bean Dredging Corp. v. Dredge Technology Corp.,* 744 F.2d 1081 (5th Cir. 1984). Additionally, it is important to note that Corinth has made 42 sales of tubular goods totalling over $73 million to the Texas market during a seven year period; when viewed in light of this brisk activity, any unfairness to Corinth in having to defend a claim in Texas which arises out of one of those sales is relatively insignificant. The court below did not err in exercising jurisdiction over Corinth.

B. Choice of Law

Corinth maintains that the district court erred in applying Texas law instead of Greek law, under which the plaintiff's claim would have been time-barred. Although this question is close, we hold that the district court's application of Texas law to have been proper.

> A federal court must follow the choice-of-law rules of the state in which it sits. Texas has adopted the 'most significant relationship' test of the Restatement (Second) of Conflicts section 6 (1971) for determining the applicable law in contracts cases, other than those in which the parties have agreed to a choice of law. The law of the state with 'the most significant relationship to the particular substantive issue' shall govern the dispute.

Atlantic Mutual Insurance Co. v. Truck Insurance Exchange, 797 F.2d 1288, 1291 (5th Cir. 1986) (citations omitted). The Texas Supreme Court, in applying the "significant relationship" test, looked to the contacts the litigation had with the two forums. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

> Once these contacts are established, the question of which state's law will apply is one of law. Moreover, the number of contacts with a particular state is not determinative. Some contacts are more important than others because they implicate state policies underlying the particular substantive issue. Consequently, selection of the applicable law depends on the qualitative nature of the particular contacts.

Id.

[8] In the present case, the substantive issues of the litigation were whether the warranty made by Corinth

that the casings it sold conformed to API standards and whether the failure to comply with those standards was the cause of the plaintiff's loss. Although the sale of the casings took place in Greece, the warranty underlying the lawsuit arose out of a license agreement between Corinth and API, a Dallas-based organization. It is this agreement that allows Corinth to service Texas customers seeking casings meeting API standards. The district court found that this agreement gave Texas a "significant and sufficient" relationship with the warranties made by Corinth, such that Texas law should be applied.

Corinth contends that as the ultimate economic loss incurred as a result of the casing failures fell upon AMI, an Illinois corporation, Texas has lost any interest it may have had in the present lawsuit. We disagree. To say that Texas's interest in this case begins and ends with the economic loss suffered by the nominal plaintiff ignores any general economic, environmental, or public safety interest Texas may have in a failed drilling operation performed within its borders. Moreover, the warranty made in the present case does not represent an isolated occurrence. Between the years 1978 through 1985, as we note above, Corinth made 42 sales of API standard tubular goods, totalling $73 million, to customers in Texas. Texas is Corinth's only market for API standard goods. In these circumstances, Texas could be found to have a substantial interest in ensuring that a manufacturer, whose products are purchased by Texas customers in reliance upon a warranty that they conform to the standards of a Texas organization, not be allowed to escape responsibility for its breach of that warranty through a six-month statute of limitations which expressly disallows a prediscovery tolling period. *See* Greek Civil Code 554, 555.

We acknowledge that Greece has a substantial interest in protecting its citizens from lawsuits it considers time-barred. Nevertheless, we agree with the district court that the Texas contacts with the present litigation are of a sufficiently substantial nature to mandate the use of Texas law in its resolution.

C. Findings of Fact

> Review of factual determinations by the district court is limited by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). This limited review recognizes the unique opportunity of the district court to make credibility choices and resolve conflicts in the evidence. " '[U]nless an appellate court is left with the 'definite and form conviction that a mistake has been committed,' it must accept the trial court's findings." '

Ayers v. United States, 750 F.2d 449, 452 (5th Cir. 1985) (quoting *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855, 102 S.Ct. 2182, 2189, 72 L.Ed.2d 606 (1982)).

Corinth challenges two of the district court's findings of fact. First, Corinth challenges the district court's finding that the casings which failed in Neely No. 1 were part of the casings shipped aboard the M/V JENNIE S in May of 1981. Second, Corinth challenges the district court's finding that manufacturing defects were the cause of the casing failures.

1. The origin of the failed casing

At trial, Gulf introduced documentary evidence demonstrating that the casings off-loaded from the M/V JENNIE S were sent by IMS to Onyx Pipe Threaders for

threading and that the 66 joints of casing shipped to Neely No. 1 were taken from IMS's batch of casing at Onyx. Corinth does not dispute that the casing shipped from Onyx to Neely No. 1 was manufactured by Corinth and sold with the warranty that the casing complied with API standards. Corinth contends, however, that the evidence did not foreclose the possibility that IMS may have had unsold casing left over from a previous shipment at the Onyx yard at the time the 66 joints were sold; as the 66 joints may have come from a previous shipment, the statute of limitations for breach of warranty may have run.

At trial, Blaine Curry, the vice president of purchasing for IMS in 1981, testified that, in light of IMS's practices and the market conditions at the time in question, there would have been no inventory kept at the Onyx yard. He could not, however, answer with assurance the question whether the previous shipment of the 8⅝ 24-pound casing to Onyx had been entirely sold out when the 66 joints were shipped.

[9] The testimony of Mr. Curry, along with the documentary evidence admitted at trial, is sufficient to support the finding of the district court that the casing shipped to Neely No. 1 was the same casing that was shipped aboard the M/V Jennie S. Although Corinth is correct in its assertion that Gulf has failed to foreclose the possibility that the 66 casings were from a previous sale from Corinth to IMS, upon which the statute of limitation might have run, the burden falls on the defendant to prove that a claim is time-barred. *See Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988). Corinth failed at trial to produce any evidence that the casings in question were from a previous shipment and made no offer

of proof as to when any previous shipments took place. As Corinth demonstrated no more than the mere possibility that the action was time-barred, it failed to meet its burden of proof required by this defense.

2. The cause of the casualty

Corinth contends the district court's finding that the casing failures were due to manufacturing defects was clearly erroneous or not supported by the evidence. Because the actual casing which failed was subsequently cemented in the well, none of it could be inspected after the events. As a result, no direct evidence was introduced at trial demonstrating that the casualty was caused by the casing's failing to meet API standards.

Evidence produced at trial demonstrated that the seven casing splits occurred only in the 24-pound casing string; no failures were discovered in the 32-pound casing which was used above and below it. Evidence was also introduced that two unused casings, part of the 66 24-pound casings delivered to the well, had weld seam and occlusion imperfections which rendered them defective by API standards. Gulf introduced expert testimony demonstrating that the defects were present when the casings left the manufacturer and that similar defects were the cause of the downhole failures. Corinth countered this testimony with its own expert who testified that the likely cause of the first casing failure was from mishandling and that the likely cause of the other six failures was from wear on the casing by the drill string during drilling operations.

[10] The resolution of the issue of what caused the casing failures required the district court to make a judgment as to the relative credibility of the testimony given

by the two experts, evaluated in light of the direct evidence supporting each opinion. Such choices are within the province of the court, when sitting without a jury, subject only to the clearly erroneous standard. *See Ayers v. United States*, 750 F.2d 449, 455 (5th Cir. 1985). As the district court's determination to credit the opinion of Gulf's expert cannot be characterized as clearly erroneous, the court's finding that manufacturing defects caused the down-hole failures will not be disturbed in this appeal.

D. Prejudgment Interest

When Mr. Buchanan suffered the loss due to the casing failures, he received reimbursement from United. United, in turn, made claim against Gulf. The loss was ultimately paid by AMI, Gulf's insurer. The court calculated its award of prejudgment interest from the date United paid Mr. Buchanan. Corinth contends that, as AMI did not suffer any loss until it reimbursed United, prejudgment interest should not accrue until the date of that payment. Gulf maintains, however, that the date the cause of action accrued should have been utilized in calculating prejudgment interest.

[11] There is no Texas case law dealing explicitly with the issue of prejudgment interest awards to subrogees, but the language used by the Texas Supreme Court in *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 554-55 (1985), is instructive:

> A plaintiff is not entitled to recover prejudgment interest on damages until those damages have actually been sustained. Until that time, the plaintiff has not lost the use of the money he ultimately receives from the defendant.

> Yet a system which would force litigants to determine precisely when each element of a plaintiff's damage award was incurred would impose an onerous burden on both the trial bench and bar.
>
> . . . . .
>
> A few jurisdictions allow recovery of prejudgment interest as of the date the cause of action accrues. This approach, however, does not preserve the integrity of the principle that prejudgment interest is not meant to punish defendant's misbehavior, but to achieve full compensation for plaintiffs. Rather, it overcompensates the plaintiff by awarding interest on losses not yet incurred.

Id. at 554-55. Allowing prejudgment interest only from the time of payment by AMI, the subrogee in this case, effectuates the intent expressed by the court in *Cavnar,* as it will result in a complete recovery for AMI and not overcompensate it. *See also* 83 C.J.S. Subrogation 71 (1953). As the date of AMI's payment to United does not appear in the record before us, it is appropriate for us to remand the prejudgment interest award to the district court to allow for evidence to be taken concerning AMI's date of payment to United and for a recalculation of prejudgment interest from that date.

III. *Conclusion*

We AFFIRM the judgment of the district court and its award of actual damages, attorneys' fees, expenses and costs to the plaintiff; we VACATE the district court's award of prejudgment interest and REMAND for a hearing on the issue of AMI's date of payment to United and for a recalculation of the prejudgment interest award.

REAVLEY, Circuit Judge, dissenting:

I am not convinced that Corinth Pipeworks established the type of minimum contacts with Texas that would justify subjecting it to a Texas court's jurisdiction in this contract action. I also believe that, even if Corinth had established minimum contacts with Texas, the exercise of jurisdiction under the circumstances of this case was unreasonable. Because I disagree with the majority's conclusion that the district court's exercise of jurisdiction over Corinth complied with the requirements of the due process clause, I dissent.

I. Minimum Contacts

A court may premise the exercise of jurisdiction over a nonresident defendant on either a specific or a general jurisdiction analysis. In either case, the "constitutional touchstone" of the due process inquiry is "whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (citation omitted). We have explained the object of the minimum contacts analysis in the following terms:

> We must look to see whether there has been some act by which the nonresident " 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.' The defendant's conduct and connection with the forum state must be such that [it] should reasonably anticipate being haled into court in the forum state."

Stuart v. Spademan, 772 F.2d 1185, 1190 (5th Cir. 1985) (citation omitted).

A. Specific Jurisdiction

In a specific jurisdiction case, a court should focus its analysis on the relationship between the defendant, the forum, and the litigation. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 & n. 8, 104 S.Ct. 1868, 1872 & n. 8, 80 L.Ed.2d 404 (1984); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988). A court's exercise of jurisdiction is appropriate if "the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp.*, 471 U.S. at 472, 105 S.Ct. at 2182, 85 L.Ed.2d 528 (citations omitted).

The majority concludes that the district court properly exercised jurisdiction because Corinth delivered its oil well casing into the "stream of commerce" with the expectation that it would be used in Texas. I believe that the majority's reliance on the stream of commerce rationale is inappropriate. The Supreme Court has explained the applicability of that jurisdictional doctrine.

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). As this excerpt suggests and other courts have recognized, the stream of commerce rationale developed as a means for consumers injured by defective products to acquire jurisdiction over the products' manufacturers in products liability actions. *See Max Daetwyler Corp. v. R. Meyer,* 762 F.2d 290, 298 (3d Cir.), *cert. denied,* 474 U.S. 980, 106 S.Ct. 383, 88 L.Ed.2d 336 (1985); *Pacific Atl. Trading Co. v. M/V Main Express,* 758 F.2d 1325, 1330 n. 1 (9th Cir. 1985); *Nelson v. Park Indus., Inc.,* 717 F.2d 1120, 1124 (7th Cir. 1983), *cert. denied,* 465 U.S. 1024, 104 S.Ct. 1277, 79 L.Ed.2d 682 (1984), 465 U.S. 1024, 104 S.Ct. 1278, 79 L.Ed.2d 682 (1984); *DeJames v. Magnificence Carriers, Inc.,* 654 F.2d 280, 285 (3d Cir.), *cert. denied,* 454 U.S. 1085, 102 S.Ct. 642, 70 L.Ed.2d 620 (1981). The Supreme Court has concluded that, when a manufacturer has attempted to exploit the market in a state and one of its products has injured a consumer in that state, the manufacturer should foresee that it will be subject to the jurisdiction of that state's courts in a suit by the consumer.

The considerations that justify reliance on the stream of commerce rationale in such circumstances, however, do not justify the exercise of jurisdiction in all cases. *See Bearry v. Beech Aircraft Corp.,* 818 F.2d 370, 375 (5th Cir. 1987); *Max Daetwyler Corp.,* 762 F.2d at 299 & n. 12. Thus, a foreign manufacturer is not required to litigate all disputes in a distant jurisdiction simply because it may be required to litigate some disputes there. This is why the jurisdictional analysis in a specific jurisdiction case must focus on the particular dispute giving rise to the litigation. It is the contacts that relate to the

subject matter of the litigation that determine whether the defendant has the minimum contacts with the forum necessary to justify the exercise of jurisdiction.

This litigation arose out of a contract dispute between Gulf Consolidated Services, Inc. and Corinth. Courts have not typically applied the stream of commerce rationale to justify the exercise of jurisdiction in contract disputes. Moreover, the public policy considerations that compel the application of the rationale in products liability cases are not present in breach of contract litigation, where the parties have had some type of direct contact and were able to structure the transaction in light of jurisdictional considerations. The Supreme Court has emphasized that "with respect to interstate contractual obligations, . . . parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King Corp.*, 471 U.S. at 473, 105 S.Ct. at 2182, 85 L.Ed.2d 528 (citation omitted). The issue in this case, therefore, is not whether Corinth placed the oil well casing into the stream of commerce, but whether with respect to the contract of sale Corinth purposefully availed itself of the benefits and protections of Texas law and thus could reasonably anticipate being haled into court in a dispute over that contract. *See Stuart,* 772 F.2d at 1194; *Loumar, Inc. v. Smith,* 698 F.2d 759, 764 (5th Cir. 1983).

It is well-settled that "merely contracting with a resident of the forum state is insufficient to subject the nonresident to the forum's jurisdiction." *Holt Oil & Gas Corp. v. Harvey,* 801 F.2d 773, 778 (5th Cir. 1986), *cert.*

denied, 481 U.S. 1015, 107 S.Ct. 1892, 95 L.Ed.2d 499 (1987); *see Burger King Corp.,* 471 U.S. at 478, 105 S.Ct. at 2185, 85 L.Ed.2d 528. Other "factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—. . . must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Id.* at 479, 105 S.Ct. at 2185, 85 L.Ed.2d 528.

There is absolutely no evidence in the record indicating that Corinth reached out and attempted to establish a contractual relationship with Gulf Consolidated. Corinth is a Greek corporation and has its principal factory and offices in Greece. Corinth is not registered to do business in Texas or in any other location in the United States, and it maintains no agents, offices, or assets in the United States. Gulf Consolidated has presented no evidence that Corinth advertises in Texas or in the United States. Corinth is licensed by the American Petroleum Institute, but at most this indicates Corinth was prepared to sell to purchasers requiring pipe meeting API standards. The licensing agreement in itself is not evidence that Corinth was attempting to exploit the Texas oil well pipe market.

With respect to the particular contract at issue, the record indicates that the center of the contracting process was in Greece. Gulf Consolidated opened negotiations with a telex to the Corinth offices in Athens. Corinth manufactured the casing in its factory in Greece, and the risk of loss passed to Gulf Consolidated when the casing was loaded onto a ship in Port of Corinth, Greece. Payment was made and the transaction completed when Corinth drew upon a letter of credit previously opened

by Gulf Consolidated at the National Bank of Greece in Athens. The only connection Corinth had with Texas was its exchange of telexes with Gulf Consolidated and the shipment of the casing, at Gulf Consolidated's direction, to Texas. These contacts are insufficient to justify the exercise of jurisdiction over Corinth by a Texas court. *See Stuart*, 772 F.2d at 1193; *Loumar, Inc.*, 698 F.2d at 763; *Charia v. Cigarette Racing Team*, 583 F.2d 184, 188-89 (5th Cir. 1978).

The majority suggests that Corinth chartered the vessel that delivered the oil well casing to Texas and that this is significant for jurisdictional purposes. The contract between Corinth and Gulf Consolidated required Corinth to pay shipping costs and arrange delivery of the casing. There is testimony in the record that Corinth sometimes chartered[1] vessels to deliver its pipe when the contract required it to arrange delivery. The witness who gave this testimony, however, indicated that he was not involved in this aspect of Corinth's business and that he was not certain about how shipping arrangements were made. Moreover, there was absolutely no testimony about Corinth's arrangements for delivery of the casing that was the subject of the contract involved in this case. Assuming the majority is correct that Corinth chartered the vessel that delivered the casing, this fact has no bearing on the jurisdictional analysis. The evidence in the record indicates that, regardless of the shipping arrangements, Corinth's obligations under the contract were complete and the risk of loss passed to Gulf Consolidated

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1. It is not clear from the record exactly how the witness and attorney examining him were using the term "charter." One interpretation of the testimony is that the witness simply meant that Corinth paid a shipping company to deliver the casing to the designated port.

when the casing was loaded onto the vessel in Greece and Corinth received a bill of lading. It thus would appear somewhat misleading to suggest that the mere chartering of a vessel to deliver the casing creates some kind of contact with Texas. Indeed, the cases cited above indicate that the mere shipment of goods to the forum does not justify the exercise of jurisdiction. In this case it is clear that what contact there is resulted not from any purposeful activity of Corinth but rather from the mere fortuity that Gulf Consolidated is a Texas resident and thus specified that the casing should be delivered to Texas. *See Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985).

The contract at issue did not contemplate a long-term relationship with continuing obligations but instead involved an isolated sale of oil well casing. Although it has shown that Corinth knew its products would be shipped to Texas, Gulf Consolidated has not shown that Corinth "reached out" and created contacts with Texas such as would justify an exercise of specific jurisdiction in this contract dispute.

B. General Jurisdiction

In a general jurisdiction case, a court should focus its analysis on the sum total of the defendant's contacts with the forum state to determine whether the defendant has established a general presence in the state. If there are sufficiently "continuous and systematic contacts between the State and the foreign corporation," *Bearry*, 818 F.2d at 374 (emphasis omitted), the foreign corporation may be sued in that state's courts even though a specific jurisdiction analysis would not support a court's exercise of jurisdiction. As discussed above, the issue remains whether the nonresident defendant purposefully established mini-

mum contacts with the forum state, thereby invoking the benefits and protections of the state's laws and making it foreseeable that the party would be haled into court there. *See Stuart*, 772 F.2d at 1191.

Gulf Consolidated notes that between 1978 and 1985 Corinth made forty-two sales of pipe, worth $73 million, to Texas buyers. The record indicates that each of these sales was made on the same terms as the transaction that is the subject of this dispute. As was noted previously, there is no evidence that Corinth advertised or solicited business in Texas or otherwise reached out to Texas businesses to establish these contractual relationships. Indeed, the evidence suggests that Corinth made efforts to center its activities in Greece and thereby avoid actions that would subject it to the jurisdiction of Texas courts.

The Supreme Court consistently has recognized that the due process analysis "allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S.Ct. at 567, 62 L.Ed.2d 490; *see Burger King Corp.*, 471 U.S. at 472, 105 S.Ct. at 2182, 85 L.Ed. 2d 528. In *Bearry v. Beech Aircraft Corp.*, this court relied on those holdings in overturning a Texas federal district court's exercise of jurisdiction over Beech Aircraft, a Delaware corporation with its principal place of business in Kansas. Beech Aircraft had the following contacts, among others, with Texas.

> There was . . . evidence that from 1980 to 1985, Beech engaged in a nationwide marketing campaign, employing over 300 marketing employees at its Kansas office. During this five year period, nearly $250

> million of Beech manufactured products flowed to seventeen independent Texas dealers from sales carefully negotiated and completed in Kansas. . . . Beech also manufactured airframe assemblies for Bell Helicopters in Fort Worth, Texas, under contracts exceeding $72 million with all products delivered to Bell "F.O.B. Wichita." Furthermore, Beech representatives visited the Texas dealers on occasion to assist them with maintenance problems, to demonstrate new aircraft, and to offer sales incentives to the Texas dealers, but only at a dealer's request.
>
> The flow of goods also ran to Beech who purchased over $195 million of goods and services from over 500 Texas vendors under sales agreements with Texas dealers carefully negotiated in Kansas, with delivery of all goods accepted in Kansas.

Bearry, 818 F.2d at 372-73. Notwithstanding these relationships with Texas residents, the court concluded that Beech Aircraft was not subject to the general jurisdiction of Texas courts. Specifically, the court held that

> Beech exercised its right to structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states such as Texas, carefully requiring the negotiation, completion, and performance of all contracts in Kansas. Beech has not afforded itself the benefits and protections of the laws of Texas, but instead has calculatedly avoided them.
>
> . . . .
>
> . . . [D]istributors selling Beech manufactured products for their own account do not create minimum contacts sufficient to warrant general jurisdiction over Beech. Beech has no office in Texas, has no agents in Texas, and has no control over the

> Texas dealers. As such, Beech is not "doing business" in Texas.
>
> In short, that Beech products flow into Texas does not create a general presence in that state. Each transaction was completed outside of Texas. The laws of Texas neither protected nor benefited Beech.

Id. at 375-76 (citation omitted). Because Beech Aircraft's actions were not such as would result in the establishment of a general presence within the state, the court's exercise of jurisdiction was improper.

Corinth's contacts with Texas clearly are not as extensive as Beech Aircraft's contacts set forth above. Like Beech Aircraft, Corinth took steps to avoid contact with Texas by centering its activities in Greece. Through its actions, Corinth successfully avoided any appearance either that it was "doing business" in Texas or that it was seeking the benefits and protections of Texas law. Corinth has not established a general presence in Texas, and accordingly, it is not subject to the general jurisdiction of Texas courts.

II. Reasonableness

Even if a foreign corporation has established minimum contacts with the forum state, a forum court should refuse to exercise jurisdiction if requiring the corporation to defend in a particular case would not be fair and reasonable. *See Burger King Corp.*, 471 U.S. at 476, 105 S.Ct. at 2184, 85 L.Ed.2d 528. The reasonableness determination will turn on the evaluation of several factors: (1) the burden on the defendant; (2) the interests of the forum state; (3) the plantiff's interest in obtaining convenient and effective relief; (4) the interest in the efficient

resolution of controversies; and (5) the interests of the several states in furthering fundamental substantive social policies. *See Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113, 107 S.Ct. 1026, 1033-34, 94 L.Ed.2d 92 (1987); *Burger King Corp.*, 471 U.S. at 476-77, 105 S.Ct. at 2184, 85 L.Ed.2d 528.

Although the majority concedes that requiring Corinth to come to Texas to defend this suit involved a substantial burden that should be given "significant weight," it nevertheless concludes that Texas' interest in the litigation made the district court's exercise of jurisdiction reasonable. Specifically, the majority argues that "Texas has a demonstrable interest in providing a forum for litigation involving an allegedly defective product where the product was intended for use in Texas, where the defect surfaced in Texas, and where the economic injury befell a Texas resident." If the majority is suggesting that Texas has an interest in providing a forum because a Texas resident has an interest in the outcome of the litigation, the contention is without support in the record. The real party in interest is American Motorists Insurance Company, an Illinois corporation with its principal place of business in Illinois. All the Texas residents with some connection to the litigation have been made whole. If on the other hand the court is suggesting that Texas has an interest in providing a forum because maintenance of the suit in Texas will deter Corinth and other manufacturers from selling products that do not meet specified warranties, I would simply suggest that the deterrent factor in itself is an insufficient justification to make the assertion of jurisdiction reasonable. As the Supreme Court noted in *Asahi Metal Industry*, pressure to produce quality goods may be placed on manufacturers by the purchasers of

their goods so long as those who ultimately sell the goods are subject to the forum state's tort laws. *See Asahi Metal Indus.*, 480 U.S. at 115, 107 S.Ct. at 1034, 94 L.Ed.2d 92. Texas has little if any interest in providing a forum for this litigation, and any interest it does have would not outweigh the heavy burden on Corinth.

Evaluation of the third and fourth factors does not compel the conclusion that the district court's exercise of jurisdiction was reasonable. Although American Motorists does have an interest in obtaining indemnification, it has not shown that Texas is the only forum in which it could obtain that relief. Moreover, it is not clear why litigating this dispute in Texas is the most convenient forum when the real parties in interest are an Illinois corporation and a Greek corporation. Finally, this is not a situation in which a refusal by the Texas court to exercise jurisdiction would result in piecemeal litigation in multiple forums.

With respect to the fifth factor listed above, the Supreme Court has directed courts to carefully consider the interests of other nations before asserting jurisdiction over a foreign defendant. The Court has stated:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant . . . , as well as the Federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

Id. at 115, 107 S.Ct. at 1034-35, 94 L.Ed.2d 92 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404, 85 S.Ct. 528, 542, 13 L.Ed.2d 365 (1965) (Harlan, J., dissenting)). Given the heavy burden on Corinth to defend in Texas, Corinth's efforts to structure its relations to avoid the jurisdiction of Texas courts,[2] the minimal interest of Texas in providing a forum for the litigation, and the Supreme Court's direction to exercise caution in subjecting alien defendants to United States courts' jurisdiction, I conclude the district court's exercise of jurisdiction was unreasonable.

Corinth did not have sufficient minimum contacts with Texas to justify an exercise of either specific or general jurisdiction. Even if Corinth did establish minimum contacts, the district court's exercise of jurisdiction was unreasonable under the facts of this case. Because the exercise of jurisdiction was not permissible under the due process clause, the judgment in favor of Gulf Consolidated should be vacated and the cause dismissed.

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2. The majority suggests that Corinth's "brisk activity" in shipping goods to Texas made the district court's exercise of jurisdiction reasonable. I think it unlikely, however, that connections with a forum that are insufficient to establish minimum contacts would be significant in determining the reasonableness of an exercise of jurisdiction. To the extent Corinth's actions are significant in evaluating reasonableness, I would place greater emphasis on the corporation's efforts to center its activities in Greece than on sales to Texas businesses that sought out the foreign corporation to purchase its goods.

ORDER OF DISTRICT COURT

Entered December 23, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-85-4088

GULF CONSOLIDATED
Plantiff

v.

CORINTH PIPE WORKS
Defendant

O R D E R

The Court has received and reviewed the Memorandum and Recommendation filed by the United States Magistrate in the above-styled cause and the corresponding objections filed. After due consideration, the Court has concluded the Memorandum and Recommendation is true and correct and is, therefore, accepted and adopted as the Order of this Court. Accordingly, defendant Corinth Pipe Works' Motion for Summary Judgment is DENIED.

The Clerk shall send a true copy to all parties.

DONE at Houston, Texas, this the 22nd day of December, 1986.

/s/ CARL O. BUE
United States District Judge

MAGISTRATE'S OPINION

Entered August 27, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-85-4088

GULF CONSOLIDATED SERVICES, INC.
Plaintiff

v.

CORINTH PIPEWORKS S.A.
Defendant

MEMORANDUM AND RECOMMENDATION

Before the Court is the motion by defendant Corinth Pipeworks for summary judgment, asserting that the exercise of *in personam* jurisdiction is improper because defendant lacks minimum contacts with the forum State of Texas to comport with the requirements of due process and because requiring defendant to appear and defend in Texas would be fundamentally unfair. Following a hearing with the parties, this Court allowed plaintiff additional time to complete discovery on the jurisdictional issue. Plaintiff and defendant have supplemented their previous filings. After reviewing the record, this Court has concluded that it should RECOMMEND that defendant's Motion for Summary Judgment be DENIED, for the following reasons:

I.

International Materials and Service Co., Inc. [IMS], a subsidiary of the plaintiff in this contract dispute, Gulf Consolidated Services, Inc. [GCS], purchased a large amount of steel pipe casing in 1982 from defendant. Plaintiff alleges that the pipe casings were defective and failed to meet the quality and grade standards as represented by defendant.

Defendant, a Greek corporation, has its principal factory and offices in Greece. It is not registered to do business in Texas or in any other location in the United States. It maintains no agents, offices, or assets in the United States.

The transactions at issue in this case occurred following an exchange of telegrams between the IMS officers and defendant's officers. It is undisputed that the actual sales took place in Greece. Moreover. defendant's offer to sell pipe included the "C & F" requirement, which deems a seller's performance complete upon delivery of the goods to the carrier. Following several telex exchanges, IMS opened its letter of credit at the National Bank of Greece in Athens and defendant delivered the pipe to the carrier at the Port of Corinth, Greece. Defendant was responsible for arranging shipment of the goods by sea. Defendant obtained a bill of lading and risk of loss transferred to plaintiff at that time.

Plaintiff relies on defendant's answers to interrogatories which indicate that all defendant's sales to United States-based customers of steel casings in the last ten years were to four pipe companies located in Houston, Texas (including plaintiff). In its answers to interrogatories, de-

fendant agrees that it anticipated that the pipe in question would be used in the United States. In addition, the answers to interrogatories indicate that since 1978 defendant has made 42 sales of steel casings to these Houston-based customers. Each of these shipments was delivered by ship to the Port of Houston, Texas, and the total amount of these sales exceeds $73,000,000.00 All such sales occurred on similar terms to the transaction in the case at bar.

II.

Defendant does not challenge its amenability to suit under the Texas Long-Arm Statute,[1] but focuses its attack on the due process issue. The due process bifurcated test is: (1) the non-resident must have adequate minimum contacts with the forum state; and (2) "traditional notions of fair play and substantial justice" must not be offended by subjecting the non-resident to jurisdiction within the forum. *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Defendant emphasizes to this Court that the concept of minimum contacts permits a non-resident to "structure his primary conduct so as to avoid being haled into court in a particular state." *Thompson v. Chrysler Motors Corp.,* 755 F.2d 1162, 1169 (5th Cir. 1985). Specifically, the Supreme Court noted in *World-Wide Volkswagen v. Woodson,* 444 U.S. 286, 297:

> The Due Process Clause, by insuring the 'orderly administration of the laws,' . . . gives a degree of

1. At the hearing counsel for plaintiff indicated that defendant has heretofore been a party to one or more lawsuits involving damage to cargo filed in this Court pertaining to similar shipments of such pipe.

> predictability to the legal system that allows potential defendants to structure their primary conduct with some minimal assurance as to where that conduct will and will not render them liable to suit.

Citing a number of Fifth Circuit cases, defendant urges that defendant cannot be shown by plaintiff to have transacted business via "purposeful conduct" within Texas so as to avail itself of the benefits and protections of Texas law.

A review of defendant's conduct for a minimum-contacts inquiry must focus on the relationship "among the defendant, the forum, and the litigation." *Stuart v. Spademan,* 772 F.2d 1185, 1190 (5th Cir. 1985); *See Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 412 (1984).

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to the suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of a forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities[.]

Burger King Corp. v. Rudzewicz, ____U.S.____, 105 S.Ct. 2174, 2182 (1985).

As noted by the Court in *Stuart,* due process is not offended, even in a "general" jurisdiction case, that is one in which the controversy does not relate to the specific contacts with the forum, "if the contacts are sufficiently systematic and continuous as to support a reasonable exercise of jurisdiction." *Stuart v. Spademan, supra* at 1191.

The question for this Court on this due process prong of the test is whether defendant's activities in selling its

pipe in Greece to United States purchasers (specifically, Texas purchasers) and in arranging for the goods to be delivered by sea to the Port of Houston, creates a "substantial connection" with the forum state, when defendant had actual knowledge that such purchasers intended the pipe for use in the United States, and in all likelihood, Texas itself.

As noted by the Supreme Court, " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen,* 444 U.S. at 295. In *World-Wide,* the Court defined the type of foreseeability that is "critical to due process analysis":

> When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State, '. . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected cost on to the customers, or, if the risks are too great, severing its connection with the State. Hence, if the sale of the product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

444 U.S. at 296.

However, unlike the facts in *World-Wide,* this is not a case in which defendant has had no other affiliations with Texas, apart from the transaction at issue. Defendant urges that the completion of the sales transaction in Greece terminates any involvement between defendant and the ultimate market. Defendant would have this Court conclude that, since it is unconcerned exactly where its pipe is used, it is insulated from suit in that forum in which all its United States customers do business.

In *Oswalt v. Scripto,* 616 F.2d 191 (5th Cir. 1980) the Court found *in personam* jurisdiction over a Japanese manufacturer which manufactured, assembled, sold and delivered in Japan lighters to an American distributor, with the understanding that the distributor would be the exclusive distributor for the lighters in the United States and would be selling the lighters to customers with national retail outlets. Specifically, the Court concluded that jurisdiction did not depend on the technicalities regarding when and where title passes. *Id.* at 197; *Eyerly Aircraft Co. v. Killian,* 414 F.2d 591, 595-6 (5th Cir. 1969). Relying on *Coulter v. Sears, Roebuck & Co.,* 426 F.2d 1315 (5th Cir. 1970), the Court reaffirmed its holding that a foreign manufacturer which introduces its product into the "stream of interstate commerce with reason to know or expect that his product would eventually be brought into Texas" can be held to answer in the forum state. Crucial to that analysis was the finding by the Court that the manufacturer knew or should have known that its products would reach Texas in the normal course of the distribution chain.

Based on the interrogatories submitted by plaintiff, this Court concludes that plaintiff has satisfied its burden

to show a prima facie case that defendant knew or should have known that its products were being introduced into the stream of commerce and that defendant would have reason to know or expect that his product would eventually be used in Texas. *See Bean Dredging Corp. v. Dredge Technology Corp., et al,* 744 F.2d 1081 (5th Cir. 1984).

The second question to be determined is the fairness of the Texas forum for defendant. As noted before, defendant has previously defended one or more cases in this forum, and, therefore, presumably has the means to do so. More importantly, this case is akin to *Bean Dredging Corp., supra* at 1015, in that the forum state can be said to have an interest in providing a forum for the litigation because the product was used in Texas, the alleged defect surfaced in Texas, and the alleged economic injury has befallen a Texas resident. Since either the Greek or Texas forum will inherently be inconvenient to one party or the other, these foregoing factors lead this Court to conclude that it is not unreasonably inconvenient to require defendant to defend in Texas. *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483 (5th Cir. 1974).

For the foregoing reasons, it is RECOMMENDED that the defendant's Motion for Summary Judgment be DENIED.

The Clerk will file this instrument and forthwith mail a copy to all parties. Within ten days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C); failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. The original of any written objections shall be filed with the U.S. District Clerk, P. O. Box 61010, Houston, Texas 77208;

copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, P. O. Box 61252, Houston, Texas 77208.

DONE at Houston, Texas, this the 27th day of August, 1986.

/s/ KAREN K. BROWN
Karen K. Brown
United States Magistrate

FINDINGS AND CONCLUSIONS OF DISTRICT COURT

Entered February 17, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-85-4088

GULF CONSOLIDATED SERVICES, INC.,
Plaintiff,

vs.

CORINTH PIPEWORKS, S.A.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff filed suit against Defendant on April 19, 1985, alleging four causes of action: strict liability, negligence, breach of express and implied warranties, and violations of the Texas Deceptive Trade Practices Act. Trial was held in May, 1988. At that time, Defendant's Motion for Summary Judgment was pending.

FINDINGS OF FACT

1. Plaintiff, Gulf Consolidated Services, Inc., through its predecessor corporation, Gulf Supply Co., Inc., d/b/a International Materials & Service Co. ("IMS"), purchased 1,260 joints (40 feet each) of 8 5/8" x .264", 24 lb. steel oilfield casing, API 5A Grade J-55, from Defendant, Corinth Pipe Works, S.A., under Purchase Order No. 21-28-00658, dated October 10, 1980.

2. At the time of purchase, IMS was a Texas corporation with its principal office in Houston, Texas. IMS was engaged in the business of importing and selling pipe. Corinth was and is a Greek corporation with its principal office in Athens, Greece, and its factory in Corinth, Greece. It was and is engaged in the business of manufacturing and selling pipe.

3. American Motorists Insurance Co. is an Illinois corporation with its principal place of business in Illinois. It is authorized to do business in Texas.

4. The 8 5/8" x .264", 24 lb. casing in question was manufactured by Defendant, Corinth Pipeworks, in March and April, 1981, loaded on board the ocean carrier, M/V Jennie S on May 30, 1981, and delivered to Houston, Texas in June, 1981. The sale was on a C & F bill of lading. The Bill of Lading was FOB Corinth, dated May 30, 1981. Risk of loss passed to IMS when the pipe was loaded aboard the ocean carrier in Corinth.

5. All communications regarding this sales transaction were accomplished by telex exchanges between Houston, Texas and Corinth, Greece and by personal visits of IMS to Corinth's offices.

6. To finalize the contract, IMS obtained a letter of credit from Texas Commerce Bank in Houston, payable to Corinth at its bank in Greece.

7. Corinth recevied a clean bill of lading from the master of the Jennie S, which it, in turn negotiated to its bank in Athens. In return, Corinth was paid pursuant to IMS' letter of credit.

8. No specific agreement between the parties existed regarding the law that governed this sales transaction.

9. IMS subsequently sold 66 joints of the 24 lb. casing to United Pipe & Supply Co. ("UPS") in August, 1981.

10. UPS then sold the 66 joints of casing to Wayman Buchanan and delivered it to the Neely No. 1 well in Wheeler County, Texas, on August 15 and 16, 1981.

11. The well was first drilled to a depth of approximately 5200 feet. A portion of the 66 joints were installed in the well on September 8 and 9, 1981. One hundred twenty feet of 8 5/8" 32 lb. casing was installed first, followed by 2607 feet of the 8 5/8" 24 lb. casing. The first 460 feet were also encased in 13 5/8" casing.

12. After the casing was set, a leak was discovered in the body of the casing at a depth of 1,115 feet. The casing failed a pump pressure of 1000 psi. This leak was remedied by a cement "squeeze" operation and drilling was resumed.

13. Drilling proceeded without incident for one month. By October 9, 1981, the well had been drilled to a depth of 10,673 feet. Casing failures were then noticed at depths of 1,134 feet and 2,700 feet. These failures were confirmed by the casing inspection logs on October 10 and were also remedied by cement "squeeze" operations. Additional failures were later noticed, occurring at depths of 309 feet, 903 feet, 931-942 feet, and 1,129 feet. These failures were confirmed by the casing inspection logs run on October 12 and 13.

14. The log reports show that at all relevant times, on October 9, 10, 12, and 13, 1981, the 8 5/8" x. .264", 24 lb. casing ran from a depth of 120 feet to a depth of 2727 feet. The location of this casing remained unchanged, although drilling continued. There is no evidence of additional casing inserted to fill the 10,673 feet.

15. After experiencing these failures, Wayman Buchanan ran approximately 108 joints of 7" casing inside the existing casing and cemented it in place. The drilling operations on the Neely No. 1 Well were resumed on October 16, 1981.

16. Defendant Corinth Pipe Works, S. A. expressly and impliedly warranted and represented that the 8 5/8" x .264", 24 lb. casing manufactured and sold to IMS would conform to specifications promulgated by the American Petroleum Institute ("API"), located in Dallas, Texas.

17. API Specification 5A requires weld seam inspections with a pressure rating of approximately 2,700 psi. The casing in the Buchanan well failed at seven different locations on three different occasions. It was never placed under a pressure greater than 2,700 psi at any time during the drilling of the Neely No. 1 well.

18. API Specification 5A requires a minimum wall thickness of not less than 87 1/2% of the specified wall thickness. Any imperfection having a depth greater than 12 1/2% of the specified wall thickness is a defect. *See* Section 10.6.

19. The casing in question had a specified wall thickness of .264 inches. Eighty-seven and one-half percent of .264 is .231.

20. None of the failed casing segments could be removed from the well; therefore, none were available for direct inspection. However, a piece of casing from the same batch as that which experienced the failures was inspected. Under similar circumstances as that experienced during drilling, the casing split. The casing had a wall thickness of .229 inches.

21. Gulf Consolidated Service has provided evidence of damages in the amount of $454,494.56 resulting from the casing failures. (See Plaintiff's Exhibits Nos. 19-41). An independent review of the summary of costs was performed by S. C. Covington Co., Inc., who reported that 95.4% of Gulf Consolidated Service's purported damage was actually caused by the casing failures. (See Plaintiff's Exhibit No. 42). The Court finds that Plaintiff incurred damages in the amount of $433,587.81.

22. No conclusive proof was provided which would establish that continued drilling of the Neely No. 1 well would result in a productive and viable well. Therefore, no damages for loss of future production is awarded.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this case 28 U.S.C. § 1332(a)(2).

2. Texas laws governs the strict liability and negligence causes of actions. Pursuant to the Texas Civil Practice and Remedies Code § 16.003, the statute of limitations for a tort claim, whether negligence or strict liability, is two years from the time of injury. Defendant contends that the injury occurred when the pipe failed, on September 11, 1981. Plaintiff contends that, at the earliest, the injury occurred when Plaintiff paid the claim to Buchanan, on August 18, 1982. Plaintiff's theory is that this cause of action resembles an indemnity claim and thus, the cause of action accrues when payment is made. Either way, however, suit was not filed until April 19, 1985, more than two years after the date, August 18, 1982. These causes of action are barred by the statute of limitations.

3. Texas law also governs the Deceptive Trade Practices Act claim. Pursuant to § 17.565, all actions must be commenced within two years after the date on which the deceptive action occurred or within two years after the consumer discovered or should have discovered the occurrence of a deceptive act. Although Defendant does not state an accrual date, he refers to September 11, 1981, as the date on which the statute begins to run. Plaintiff, on the other hand, argues that Defendant has not met his burden of proof by not specifying an accrual date. Plaintiff argues that the actual cause in fact of the pipe's failure was not determined until after September 11, 1981. However, Plaintiff knew the pipe failed on September 11, 1981, and in any event, knew or should have known of the defect on August 18, 1982 when it paid Waylan Buchanan. Plaintiff waited over two years to file suit against Defendant for recovery of these monies paid. This claim is barred by the statute of limitations.

4. The next issue is a conflicts of laws question. Plaintiff contends that Texas law applies. Defendant contends that Greek law applies. According to Conflicts of Laws principles, the law of the state with the most significant relationship to the particular substantive issue shall govern. Restatement (Second) of Conflicts § 6. Texas has adopted this test. *Atlantic Mutual Insurance Co. v. Truck Insurance Exchange*, 797 F.2d 1288 (5th Cir. 1986); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984). This Court is of the opinion that Texas has a significant and sufficient relationship with the warranties alleged to be breached. Primarily, the warranty made the basis of the lawsuit arises out of a license agreement between Corinth and API, a Dallas-based organization. Therefore, Texas law applies to this lawsuit.

5. API Specification 5A applies to the manufacture of the casing sold by Corinth Pipeworks, S.A. to Gulf Consolidated Services, Inc.

6. The casing failed to meet the API 5A specifications. Defendant is liable under Plaintiff's breach of warranty theories. Corinth expressly represented that the casings were of a particular standard and quality and possessed certain characteristics, when, in fact, those standards were not met. Corinth also breached an implied warranty that the casings would be fit for an intended use and that they would be merchantable.

7. Plaintiff is entitled to recover damages in the amount of $433,587.81.

8. Plaintiff is entitled to receive prejudgment and post-judgment interest, which will be calculated into the final judgment.

9. Plaintiff is further entitled to an award of attorney's fees. Counsel for Plaintiff shall submit proof of attorney's fees within 15 days of the signing of this order.

10. To the extent that any of the Findings of Fact are considered to be Conclusions of Law, they are adopted as such. To the extent that any of the Conclusions of Law are considered to be Findings of Fact, they are adopted as such.

SIGNED this 16th day of February, 1989.

/s/ KENNETH M. HOYT
Kenneth M. Hoyt
United States District Judge

JUDGMENT OF DISTRICT COURT

Entered March 31, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-85-4088

GULF CONSOLIDATED SERVICES, INC.,
Plaintiff,

vs.

CORINTH PIPEWORKS, S. A.,
Defendant.

FINAL JUDGMENT

This Court made its Findings of Fact and Conclusions of Law in this cause on February 16, 1989. In accordance with those Findings of Fact and Conclusions of Law, it is

ORDERED, ADJUDGED, and DECREED that Plaintiff Gulf Consolidated Services, Inc. shall recover a Judgment against Defendant Corinth Pipeworks, S.A. as follows:

1. Actual damages of $433,587.81;

2. Prejudgment interest on its actual damages in the amount of $394,640.62;

3. Attorneys' fees in the amount of $55,050.18;

4. Expenses and costs in the amount of $6960.20;

5. Postjudgment interest on the total amount of this Judgment, at the rate of 9.16% per annum from the date of this Judgment until paid.

It is further ORDERED, ADJUDGED, and DECREED that in the event the Defendant Corinth Pipeworks, S.A. unsuccessfully appeals this Judgment to the United States Court of Appeals for the Fifth Circuit, the Plaintiff Gulf Consolidated Services, Inc. shall recover additional attorneys' fees and expenses of $5,000. If the Defendant should further unsuccessfully appeal this Judgment to the Supreme Court of the United States, the Plaintiff shall recover further attorneys' fees and expenses of $5,000.

It is finally ORDERED, ADJUDGED, and DECREED that in the event the Plaintiff must take action to enforce this Judgment and collect upon it, the Plaintiff shall recover additional attorneys' fees and expenses of $2,500, unless such collection efforts shall require efforts to collect the Judgment in Greece, in which case, the Plaintiff shall recover the additional sum of $15,000 in attorneys' fees and expenses.

SIGNED this 29th day of March, 1989.

/s/ KENNETH M. HOYT
Kenneth M. Hoyt
United States District Judge

JUDGMENT OF COURT OF APPEALS

Entered April 26, 1990

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2451

D.C. Docket No. CA H 85 4088

GULF CONSOLIDATED SERVICES, INC.,
Plaintiff-Appellee,

versus

CORINTH PIPEWORKS, S.A.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before GEE, REAVLEY and GARWOOD, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court and its award of actual damages, attorneys' fees, expenses and costs to the plaintiff is affirmed;

the District Court's award of prejudgment interest is vacated and remanded for a hearing on the issue of AMI's date of payment to United and for a recalculation of the prejudgment interest award.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal.

April 26, 1990

Reavley, Circuit Judge, dissents.

ISSUED AS MANDATE: June 4, 1990

ORDER DENYING PETITION FOR REHEARING

Entered May 23, 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2451

GULF CONSOLIDATED SERVICES, INC.,
Plaintiff-Appellee,

versus

CORINTH PIPEWORKS, S.A.,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(May 23, 1990)

Before GEE, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

Supreme Court, U.S.
FILED
SEP 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 90-331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CORINTH PIPEWORKS, S.A.,
Petitioner

v.

GULF CONSOLIDATED SERVICES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES

Corinth Pipeworks, S.A.
Gulf Consolidated Services, Inc.
American Motorists Insurance Company

RELATED CORPORATIONS

Respondent Gulf Consolidated Services, Inc.'s parent corporation is the Mead Corporation. American Motorists Insurance Company is one of the Kemper Group of insurance companies.

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v.

GULF CONSOLIDATED SERVICES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

I. INTRODUCTION

In its Statement of The Case, Petitioner has left out several facts that were obviously significant to the District Court and the United States Court of Appeals. Respondent seeks to bring those facts to the Court's attention by way of this Introduction.

As the Record demonstrates, the basis of the underlying suit and the Judgment of the District Court was the breach of a warranty by Corinth Pipeworks, S.A. (Corinth). Corinth expressly warranted that the oilfield casing that it sold to Gulf Consolidated Services, Inc. (GCS) complied with the specifications of the American

Petroleum Institute (API), an organization based in Dallas, Texas. Corinth was entitled to make this warranty by virtue of its licensing agreement with API. The API warranty was material to both GCS and Corinth. GCS wanted to purchase only API oilfield tubular products, and Corinth's sole market for API oilfield tubular products was Houston, Texas. In fact, Corinth representatives made periodic trips from Greece to Houston, Texas to call on its Houston customers.

The particular purchase transaction involved in this suit was not an isolated occurrence. It was one of forty-two (42) sales Corinth made to its four Houston customers during the years 1978 through 1985. Corinth received $73,000,000 from its Houston customers as a result of these sales. Each of the sales involved terms similar to those of the transaction in question, including the establishment of a Letter of Credit at a Texas bank naming Corinth as a beneficiary. Corinth also carried the casing in question and other shipments of casing from Greece to Houston, as the charterer of various vessels.

The particular casing involved in this suit was received by GCS in Houston, sold to United Pipe and Supply in Midland, Texas and subsequently delivered to Wayman Buchanan for use on the Neely No. 1 well in Wheeler County, Texas. The casing was installed in this well and subsequently failed because of weld seam defects that demonstrated that the casing was not manufactured in accordance with API specifications, as warranted by Corinth.

A federal magistrate, a federal District Court, and the United States Court of Appeals for the Fifth Circuit have all determined that Corinth had sufficient "minimum

contacts" with Texas and that it was fair and reasonable to require Corinth to defend this suit in Texas. The foregoing contacts recited above, most of which were omitted from Corinth's Petition for Writ of Certiorari, clearly establish that the magistrate, the District Court, and the United States Court of Appeals all correctly decided that Corinth was subject to personal jurisdiction in Texas.

II. THE PETITION SHOULD BE DENIED

The basis of Corinth's Petition is its assertion that the opinion of the United States Court of Appeals for the Fifth Circuit in this case allegedly conflicts with this court's opinion in *Asahi Metal Industry Company, Ltd. v. Superior Court of California.*[1] Unfortunately, Petitioner's contention misses the holding of this Court in *Asahi* and the holding of the United States Court of Appeals in this case. Therefore, the Petition should be denied.

According to its Petition, Corinth apparently acknowledges that it did have "minimum contacts" sufficient for the exercise of personal jurisdiction. It appears that Corinth's only argument is that it was not fair and reasonable to require Corinth to defend this case in Texas. In *Asahi,* this Court determined that "minimum contacts" sufficient for the exercise of personal jurisdiction were not established, and the exercise of personl jurisdiction over Asahi Metal was unreasonable and unfair.[2] However, this Court also noted that once minimum contacts were established, the interests of the plaintiff and the forum in the exercise of jurisdiction would justify even serious burdens placed on a foreign defendant.[3]

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1. 480 U.S. 102 (1987).
2. 480 U.S. at 116.
3. *Asahi,* 480 U.S. at 114.

Unlike *Asahi,* the interests of GCS and Texas in this case, as noted by the Court of Appeals, are not slight, and Corinth's relationship with Texas is significant.[4] Corinth marketed and manufactured the casings in question for its Texas market. These casings were warranted to be manufactured in accordance with API specifications, and Corinth's sole market for such products was Houston, Texas. In fact, Corinth made forty-two sales of API oilfield tubular goods totalling over $73,000,000 to its customers in Houston, Texas during the years 1978 through 1985. Corinth even delivered the casings, as the charterer of numerous vessels, from Greece to Texas. Of course, Corinth's defective product, intended for use in Texas, failed in Texas, and caused economic harm to a Texas resident and a Texas corporation.

In the opinion of the Court of Appeals, all of these factors sharply distinguished the factual situation of this case from the slight interests of a Japanese corporation and California in that suit.[5] In fact, the Court of Appeals concluded that the unfairness to Corinth, given the foregoing factors, was relatively insignificant, especially since the suit arose out of one of the sales it had made in its sole market for the product.[6]

It is obvious the opinion of the Court of Appeals in this case was consistent with the principles enunciated by this Court in *Asahi.* Certainly, this Court was not suggesting that all foreign defendants who have no significant physical presence in the United States are exempt

4. *Gulf Consolidated Services, Inc. v. Corinth Pipeworks, S.A.,* 898 F.2d 1071, 1073-74 (5th Cir. 1990).

5. *Gulf Consolidated Services, Inc.,* 898 F.2d at 1074-75.

6. *Gulf Consolidated Services, Inc.,* 898 F.2d at 1075.

from personal jurisdiction in the courts of this country. In fact, this Court stated that designing a product for a market in the forum state, soliciting business in the forum state, regular contacts with customers in the forum state, and establishing channels for the delivery of the foregoing defendant's products in the forum state was additional conduct to be considered in determining whether it was reasonable and fair to exercise personal jurisdiction over a foreign defendant.[7]

Of course, such additional conduct was not present in *Asahi*;[8] however, there is significant evidence of such additional conduct by Corinth in this case.[9] Thus, the only difference between this case and *Asahi* are the facts to which the principles of personal jurisdiction delineated by this Court are applied. Quite simply, Corinth purposefully directed its activities towards Texas and Asahi Metal Industry Company did not purposefully direct its activities towards California. This factual difference does not create a conflict between the Court of Appeals decision in this case and the opinion of this Court in *Asahi*. It certainly does not support the granting of Corinth's Petition.

The mere fact that the Court of Appeals reached a different conclusion in this case than this Court reached in *Asahi* does not create a conflict. Furthermore, the Court of Appeals opinion in this case does not cast any uncertainty over foreign purchases. Clearly, if a foreign corporation routinely and regularly markets its products to a particular market in the United States, serves that mar-

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7. *Asahi*, 480 U.S. at 112.

8. 480 U.S. at 112-13.

9. *Gulf Consolidated Services, Inc.*, 898 F.2d at 1973-75.

ket consistently and substantially over a substantial period of time, and gains significant economic benefits from that relationship, then the foreign defendant should reasonably expect to be haled into the courts of that market for claims arising out of the products it markets there. Such a conclusion is consistent with this Court's opinion in *Asahi* and the Court of Appeals opinion in this case.

CONCLUSION

As is established above, there is no conflict between the opinion of the United States Court of Appeals for the Fifth Circuit in this case and this Court's opinion in *Asahi Metal Industry Company v. Superior Court of California,* 480 U.S. 102 (1987). Since that is the only reason given by the Petitioner for the issuance of a Writ of Certiorari, the Petition must be denied.

Respectfully submitted,

By: _____
HOWARD R. KING

Of Counsel:
FUNDERBURK & FUNDERBURK